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12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 JOSEPH SHAYOTA and
16 ADRIANA SHAYOTA
17 Defendant.

12 Case No. 15-CR-00264-LHK

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15 **ORDER DENYING DEFENDANT
16 JOSEPH SHAYOTA'S MOTION TO
17 SEVER**

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19 After opening statments on October 25, 2016, Defendant Joseph Shayota moved to sever
20 his trial from the trial of his wife and co-defendant Adriana Shayota. Joseph Shayota contended
21 that he should be tried separately because Adriana Shayota's opening statement raised Joseph
22 Shayota's extramarital affair with Tyneisha Evans even though the Government's opening
23 statement did not. Thus, Joseph Shayota claimed that Adriana Shayota's opening statement was
24 unfairly prejudicial and forced Joseph Shayota to modify his opening statement.

25 The Court has already granted several severances in the instant case, in which eleven
26 defendants were indicted. One of the defendants is a fugitive, and four others have pled guilty. Six
27 defendants remain, and the Court will conduct three trials with two defendants per trial. The

1 history of severances in this case follows.

2 On March 23, 2016, Defendants Joseph Shayota and Kevin and Fadi Attiq filed motions to
3 sever. ECF Nos. 117, 111. The motions sought to sever Defendants' trials from the trial of Walid
4 Jamil. The basis of Joseph Shayota's motion was that the Government would "introduce at trial
5 out-of-court confessions or admissions made by [Walid] Jamil in the form of deposition testimony
6 from [certain] related civil proceedings." ECF No. 145 at 5. Such testimony, Joseph Shayota
7 argued, would run afoul of the holding in *Bruton v. United States*, 391 U.S. 123 (1968). The Court
8 found Joseph Shayota's motion to sever premature, as the Government had not yet indicated what
9 deposition testimony it would offer at trial. *Id.* at 5–6. The Court therefore denied Joseph
10 Shayota's motion to sever without prejudice.

11 The basis for Kevin and Fadi Attiq's motion to sever was that Walid Jamil had filed a
12 declaration stating that Walid Jamil would offer exculpatory testimony as to Kevin and Fadi Attiq
13 if Walid Jamil were tried separately from Kevin and Fadi Attiq. The Court granted Kevin and Fadi
14 Attiq's motion to sever. *Id.* at 5. In reaching this conclusion, the Court noted that Kevin and Fadi
15 Attiq "ha[d] made a reasonable showing that [co-Defendant] Walid Jamil would testify if
16 severed," and that Walid Jamil would offer exculpatory testimony. *Id.* at 3. "In particular," Kevin
17 and Fadi Attiq had "provided a declaration from Walid Jamil directly stating that he would testify
18 on behalf of [Kevin and Fadi Attiq] if their case were to be severed, but that he would not wish to
19 testify at a joint trial." *Id.* at 3–4.

20 On August 24, 2016, the Court held a status conference in which the Court ordered the
21 parties to meet and confer regarding severance issues and file a Joint Severance Status Report.
22 ECF No. 207 at 1–2. The parties filed their Joint Severance Status Report on August 26, 2016.
23 ECF No. 208. In this report, the parties agreed to hold one joint trial for Joseph Shayota and
24 Adriana Shayota and another joint trial for Kevin Attiq and Fadi Attiq. *Id.* at 1. The Government
25 proposed a single trial for the remaining Defendants: Walid Jamil, Raid Jamil, Leslie Roman,
26 Mario Ramirez, and Camilo Ramirez. *Id.* "All of the Defendants, except for Raid Jamil, Mario
27 Ramirez[,] and Camilo Ramirez, stipulate and agree[d]" to this proposed trial grouping. *Id.* On

1 September 13, 2016, the Court granted a motion by Mario Ramirez and Camilo Ramirez to sever
2 their trial from the trials of Walid Jamil, Raid Jamil, and Leslie Roman. ECF No. 238. At that
3 time, the Court was prepared to hold the following four trials: (1) Joseph Shayota and Adriana
4 Shayota, (2) Kevin Attiq and Fadi Attiq, (3) Mario Ramirez and Camilo Ramirez, and (4) Walid
5 Jamil, Raid Jamil, and Leslie Roman. However, Walid Jamil, Raid Jamil, and Leslie Roman pled
6 guilty. As a result, three trials of two defendants each remain.

7 Thus, on August 24, 2016, Joseph Shayota and Adriana Shayota agreed to be tried jointly.
8 Since that time, Joseph Shayota and Adriana Shayota have in large part litigated the case together:
9 they have filed joint motions, ECF No. 220, 270, 306, 307, 323, a joint administrative motion,
10 ECF No. 353, joint responses, ECF No. 346, 265, joint objections, ECF No. 359, a joint witness
11 list, ECF No. 253, joint exhibit lists, ECF Nos. 263, 354, 369, joint proposed jury instructions,
12 ECF No. 260, a joint proposed verdict form, ECF No. 256, and joint proposed voir dire, ECF No.
13 254. At no point between Joseph Shayota's stipulation to be tried jointly with Adriana Shayota on
14 August 26, 2016 and the beginning of trial on October 24, 2016, did Joseph Shayota move to sever
15 his trial from the trial of Adriana Shayota. Additionally, Joseph Shayota did not file a motion in
16 limine to exclude any discussion of the extramarital affairs. Furthermore, Joseph Shayota and
17 Adriana Shayota's joint witness list filed on September 14, 2016 identified Tyneisha Evans, one of
18 the persons with whom Joseph Shayota had an affair, as their second witness. ECF No. 253.

19 Under Federal Rule of Criminal Procedure 12(b)(3)(D), a motion to sever defendants
20 "must be raised by pretrial motion if the basis for the motion is then reasonably available and the
21 motion can be determined without a trial on the merits." Joseph Shayota never moved to sever his
22 trial from the trial of Adriana Shayota until October 25, 2016, after a jury had been selected, the
23 Court had conducted a hearing during which the civil proceeding deponents invoked their Fifth
24 Amendment rights and rendered themselves unavailable to testify in the instant criminal case, and
25 opening arguments had been given in the joint trial.

26 Joseph Shayota does not claim that the October 25, 2016 motion for severance was timely
27 because it could be determined only by a trial on the merits. Therefore, the Court must determine
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1 whether the October 25, 2016 motion was timely because it was not reasonably available to
2 Joseph Shayota before trial. If the basis for the motion was reasonably available to Joseph Shayota
3 before trial, then the October 25, 2016 motion for severance is untimely under Rule 12(b)(3)(D).
4 *See, e.g., United States v. Mausali*, 590 F.3d 1077, 1081 (9th Cir. 2010) (holding that a defendant
5 had waived the argument that the district court erroneously failed to sever his trial with a co-
6 defendant because the defendant never moved for a severance before trial); *United States v.*
7 *Yarbrough*, 852 F.2d 1522, 1531 (9th Cir. 1988) (“A motion for severance must be made both
8 before trial and at the close of the prosecution’s case-in-chief to preserve the issue on appeal.”).

9 On October 19, 2016, the Court found that, assuming Walid Jamil was found to be
10 unavailable to testify, deposition testimony of Walid Jamil was admissible. ECF No. 331. Many
11 portions of this deposition testimony discussed Joseph Shayota’s extramarital affairs. *See, e.g.*,
12 Government Exhibit 60, 107:15–108:18; Government Exhibit 243:8–243:16. Thus, by at least
13 October 19, 2016, five days before trial began, Joseph Shayota was on notice that the Government
14 would introduce evidence concerning Joseph Shayota’s extramarital affairs, including the affair
15 with Tyneisha Evans. However, Joseph Shayota did not move for severance based on this
16 testimony. Instead, on October 21, 2016, Joseph Shayota moved to exclude certain statements
17 from the deposition testimony of Walid Jamil, including discussion of the extramarital affairs.
18 ECF No. 337. The Court denied this motion as to discussion of the extramarital affairs on October
19 24, 2016. ECF No. 372.

20 Joseph Shayota knew as early as August 19, 2016, when the Government gave notice that
21 it intended to use at trial the deposition testimony of Walid Jamil, that the extramarital affairs may
22 be introduced into evidence. ECF No. 206. Indeed, as discussed above, Joseph Shayota and
23 Adriana Shayota’s September 14, 2016 joint witness list included Tyneisha Evans. ECF No. 253.
24 Thus, the basis for the October 25, 2016 motion to sever – that a joint trial would involve the
25 admission of unfairly prejudicial evidence about Joseph Shayota’s extramarital affairs – was
26 reasonably available to Joseph Shayota before trial. The October 25, 2016 motion is therefore
27 untimely, and Joseph Shayota has not asserted any “good cause” to allow him to assert an

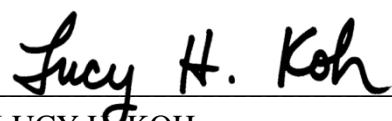
1 untimely motion. FED. R. CRIM. P. 12(c)(3) (“If a party does not meet the deadline for making a
2 Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or
3 request if the party shows good cause.”).

4 Even if the motion for severance were timely, however, the Court would find that a
5 severance is not justified in this case. “[A] district court should grant severance under Rule 14
6 only if there is serious risk that a joint trial would prejudice a specific trial right of one of the
7 defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro*
8 *v. United States*, 506 U.S. 534, 539 (1993). As the Court has held, the evidence of Joseph
9 Shayota’s extramarital affairs is relevant to the Government’s case against Joseph Shayota, and its
10 probative value is not substantially outweighed by its prejudicial effect under Rule 403. ECF No.
11 372. Evidence of Joseph Shayota’s extramarital affairs is relevant to Joseph Shayota’s financial
12 motivation for engaging in the alleged crimes, and it is also relevant to tracing the proceeds of the
13 alleged crimes. Even if Joseph Shayota were the only defendant on trial, the Court would find that
14 evidence of the extra-marital affairs is probative and admissible. The admission of this evidence in
15 a joint trial therefore cannot justify severing Joseph Shayota’s trial from Adriana Shayota’s trial.

16 The joint trial is now “well under way,” *United States v. Mariscal*, 939 F.2d 884, 886 (9th
17 Cir. 1991), and Joseph Shayota has not offered any new reason to believe that he will be
18 prejudiced by being tried jointly with Adriana Shayota. Defendant Joseph Shayota’s motion to
19 sever is therefore DENIED.

20 **IT IS SO ORDERED.**

22 Dated: October 28, 2016

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24 LUCY H. KOH
United States District Judge